Supreme Court, U.S.
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No. 91-2043

In the Supreme Court of the United States

OCTOBER TERM, 1992

PRICELESS SALES AND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the discretionary function exception of the Federal Torts Claims Act, 28 U.S.C. 2680(a), protects the United States from liability for the alleged negligence of government contracting officers in determining the acceptability of individuals proposed as sureties.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not reported, but it is noted at 959 F.2d 231 (Table). The opinion of the district court (Pet. App. 7a-25a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1992. The petition for writ of certiorari was filed on June 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner sued the United States under the Federal Torts Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, to recover $95,244.04 in losses it sustained as a subcontractor on a Federal Highway Administration (FHA) construction project. Jennings International Corporation, the now-bankrupt general contractor, failed to pay petitioner for materials and labor petitioner supplied for the project, and the payment bond furnished by Jennings proved to be worthless. Petitioner sought to hold the United States liable for the losses it incurred, alleging that FHA employees had been negligent in approving two individuals as sureties for the payment bond that Jennings was required by law to provide. Pet. App. 2a.[1]

The district court heard testimony from two FHA employees who had reviewed the required affidavits in support of the sureties. The court concluded that the FTCA's discretionary function exception, 28 U.S.C. 2680(a), applies to the agency's determination of the acceptability of an individual surety, because the applicable regulation gives the agency discretion in making that decision and that exercise of discretion was grounded in economic policy. Pet. App. 21a-22a. The court noted that the discretionary function exception would protect the United States from liability even if the government employees were negligent in the performance of that discretionary function. *Id.* at 23a-24a.

The court of appeals affirmed. Pet. App. 1a-6a. The court of appeals agreed that the FHA employees' activities in this case were subject to the FTCA's discretionary function exception, noting that petitioner "can

[1] The regulation setting forth requirements for the approval of individual sureties, 48 C.F.R. 28.202-2 (1989), is set out at Pet. App. 26a.

point to no nondiscretionary duty or function that the FHA violated." *Id.* at 5a-6a. The court noted that the relevant regulation did not require rejection of Jennings' sureties. *Id.* at 6a. "What additional information the FHA sought and how the FHA chose to evaluate this information was wholly within the discretion of the FHA, since there is no requirement that the FHA investigate persons proposed as sureties." *Ibid.*

ARGUMENT

1. This Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), established a two-part test for applying the discretionary function exception. The court must "first consider whether the action is a matter of choice for the acting employee." *Id.* at 536. If the employee is required to follow a course of action that is specifically prescribed by a federal statute, regulation, or policy, the discretionary function exception does not apply. *Ibid.* If the challenged conduct involves an element of judgment, then the court must additionally determine whether the challenged conduct is of the kind that the discretionary function exception was designed to shield. *Ibid.* "The focus of the inquiry is * * * on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 111 S. Ct. 1267, 1275 (1991).

In this case, the relevant federal regulation directs the FHA to "determine the acceptability of individuals proposed as sureties." 48 C.F.R. 28.202-2(a) (1989). But the steps the agency and its employees take in doing so are almost entirely a "matter of choice" (*Berkovitz*, 486 U.S. at 536).[2] The regulation leaves the method of verifying

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[2] The federal regulation directs only that contracting officers "shall consider the number and amounts of other bonds upon which a proposed individual surety is bound, and the status of the contracts for which such bonds were furnished." 48 C.F.R. 28.202-2(a)

the net worth of an individual surety in each individual case to the discretion of the contracting officer. Pet. App. 21a-22a. The grant of discretion is manifest on the face of the regulation, which notes, for example, that certain information "is helpful in determining the net worth of proposed individual sureties." 48 C. F. R. 28.202-2(b) (1989). Pet. App. 22a n.1.

As was true of the federal agency in *Gaubert* with regard to the banking business, the FHA's "[d]ay-to-day" activities here—*i.e.*, its determinations regarding the acceptability of sureties for bonds covering federal highway projects—"regularly require judgment as to which of a range of permissible courses is the wisest." 111 S. Ct. at 1275. That exercise of discretion is grounded in economic policy and illustrates an important basis for the discretionary function exception: "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Pet. App. 22a. Both lower courts in this case properly recognized that the agency action here fell within the FTCA's discretionary function exception. Pet. App. 5a-6a, 18a-19a. See *Gaubert*, 111 S. Ct. at 1274-1279.[3]

2. Petitioner's argument (Pet. 9-13) that the decision below conflicts with this Court's decision in *Berkovitz* is without merit. In that case, the Court found the discretionary function exception inapplicable to claims based

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(1989). As the court of appeals noted, "[t]his requirement is not at issue in the present case." Pet. App. 5a n.4.

[3] Petitioner's attempt to distinguish *Gaubert* (Pet. 12) is unavailing. *Gaubert*'s teachings are no more limited to cases involving "the 'day to day operations' of a business taken over by the government" than are those of *Berkovitz* limited to cases involving the government licensing of polio vaccines.

on Food and Drug Administration regulations that imposed mandatory standards for agency action. See 486 U.S. at 542-545.[4] As both courts below recognized, this case involves a regulation that sets no such applicable mandatory standards. Pet. App. 6a, 19a-22a. Although petitioner accuses FHA personnel of "creat[ing] substitutes for the regulations' requirements" (Pet. 13), and makes repeated references to violation of "regulations" (*id.* at 14-16), it points to no specific violation of any duty mandated by the regulation at issue. See Pet. App. 20a ("Although there are mandatory provisions contained in the regulation, the FHA employees in this case fully complied with those particular requirements."). Petitioner's reliance on *Berkovitz* is accordingly misplaced.

Petitioner also appears to argue that once the agency undertook what petitioner concedes was a discretionary step in deciding to conduct an investigation, the discretionary function exception no longer applied. Pet. 12-13. See Pet. App. 23a. This Court has previously rejected such arguments, quoting a statement in the House Report on the FTCA that the legislation "is not intended to authorize a suit for damages to test the validity of or

[4] More specifically, in *Berkovitz* the Court found the discretionary function exception inapplicable to claims that the agency: (a) issued a license without first receiving data the manufacturer must submit to the agency; (b) licensed the product without determining whether it complied with regulatory standards; and (c) specifically found that the product failed to comply with certain regulatory standards and nonetheless issued a license. 486 U.S. at 542-544. In addition, the Court remanded the case for further consideration of the claim that the agency made a determination of compliance. *Id.* at 545. On remand, the district court found that because the agency determination of compliance involved the exercise of policy judgment, it was immune from judicial review by virtue of the discretionary function exception. *In re Sabin Oral Polio Vaccine Prod. Liab. Litig.*, 743 F. Supp. 410, 415 (D. Md. 1990).

provide a remedy on account of such discretionary acts even though negligently performed and involving an abuse of discretion." *Dalehite* v. *United States*, 346 U.S. 15, 30, 33-34 (1953) (quoting H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942)). See also *Red Lake Band of Chippewa Indians* v. *United States*, 800 F.2d 1187, 1194 (D.C. Cir. 1986) (the negligent performance of a discretionary function does not subject the government to liability under the FTCA). Petitioner cannot escape the controlling fact that the activity at issue here—determination of the acceptability of sureties—is a discretionary function. Even if the government's investigation was negligent, the FHA's approval of the sureties remains subject to the FTCA's exception for discretionary acts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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